Federal Court  Cour fédérale

Date: 20130529

Docket: IMM-10524-12

Citation: 2013 FC 574

Vancouver, British Columbia, May 29, 2013

PRESENT: The Honourable Mr. Justice Richard Mosley

BETWEEN:

F. A. M.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by the Refugee Protection Division of the Immigration and Refugee Board that the applicant was neither a Convention refugee nor a person in need of protection.

[2] The applicant is a citizen of Pakistan who arrived in Canada on December 22, 2010. He filed a refugee claim on January 26, 2011, based on a fear of persecution from known and

unknown individuals related to his treatment by his family and former university schoolmates and work colleagues.

[3] On April 16, 2012, the Refugee Protection Division (RPD) received an application for procedural accommodation of the applicant as a vulnerable person from his counsel. Counsel had previously advised the RPD that it was apparent that his client was suffering from a mental illness and that he might not be able to take instructions from the claimant. Arrangements were made to obtain a psychological assessment. That assessment, dated March 19, 2012, was filed with the RPD. The psychologist concluded that the applicant presented with symptoms consistent with a diagnosis of schizophrenia (paranoid type) noted by bizarre delusions and disordered thinking. He indicated that it would be inappropriate to ask the applicant to give verbal testimony because the severity of his symptoms made it impossible for him to give meaningful responses. Accordingly, the application for accommodation requested that the right to give testimony before the RPD be waived.

[4] On April 20, 2012, the RPD assistant deputy chairperson considered the information submitted and concluded that the applicant was a vulnerable person as his ability to present his case was severely impaired. The decision letter states:

> It does not appear that any pre-hearing accommodation is required, other than priority scheduling, which we will provide. At the hearing itself, it will be open to the Presiding Member to forego questioning of the claimant, other than with respect to his identity and the truth of the information in the PIF. If counsel feels claimant cannot answer even those questions, please request a prehearing conference. It is clear from the expert report that no Des Rep is required; however, nothing requires the claimant to answer questions if he prefers to rely solely on the written record, namely, the PIF and disclosure filed.

[5] At the outset of the RPD hearing at Calgary on July 10, 2012, the Presiding Member indicated that she was aware of the psychologist's report and wished to ask the applicant questions regarding the several issues arising from his claim. The hearing then proceeded without any apparent further consideration, as disclosed by the transcript, of whether the applicant was capable of giving evidence. Initially, he was coherent but as the questioning continued he began speaking very rapidly causing the Member difficulty in following his testimony and his answers became increasingly bizarre and delusional.

[6] One example will suffice to illustrate the delusional nature of the testimony:

> *Hearing transcript, page 57 –*
>
> Presiding Member: - so why did you say there was black magic involved?
>
> Claimant: Because how else would you describe this light at my head, burning and killing me from inside on my head? And I was in distress for like 15 to 30 minutes. I was yelling, screaming in the airplane. If you ask, interrogate the air staff, I emailed British Airways about this incident. I – my email is blocked by Microsoft because –
>
> Presiding Member: Okay. So what is black magic?
>
> Claimant: Black magic –
>
> Presiding Member: How did black magic become involved?
>
> Claimant: Yeah. This is something, the Power of Genies (phonetic) (indiscernible) at a previous hearing. The Power of Genie is when people who have control over Genies, use them to do this. And black magic and the Power of Genies has been existing since the time started. So it has been in the – in the scriptures, too.
>
> Presiding Member: Okay. Let's not go there. [. . .]

[7] When questioned by his counsel, the applicant acknowledged not having taken his medication, a problem that had been identified by the psychologist in her report. There is no indication in the transcript whether this was considered before the hearing began.

[8] The reasons for decision dated September 12, 2012 indicate at the outset that the *Chairperson's Guidelines and Procedures with Respect to Vulnerable Persons Appearing before the IRB* were taken into consideration in making the determination. However, there is no further reference to the guidelines in the decision or to the applicant's bizarre ideation at the hearing. The Member's analysis discusses the issues of credibility and subjective fear, re-availment, failure to claim in the US, delay in claiming in Canada, and the applicant's explanations without at any time acknowledging that his explanations at the hearing were often patently delusional.

[9] The application of the *Chairperson's Guidelines* in this instance raises an issue of procedural fairness which is reviewable on the standard of correctness: *Sharma v Canada (MCI)*, 2008 FC 908 [*Sharma*], at paras 13-16; *Gilles v Canada (MCI)*, 2011 FC 7 [*Gilles*], at para 11. The application of the guidelines in the determination of the other issues raised by the claim, including credibility, is subject to the standard of reasonableness: *Hernandez v Canada (MCI)*, 2009 FC 106 at paragraph 13.

[10] In another quite recent case, *Hillary v Canada (MCI)*, 2010 FC 638, aff'd 2011 FCA 51, leave to appeal to SCC refused [2011] SCCA No 165 (QL) [*Hillary*], the claimant had asked to reopen his file two years after a first hearing, stating that he had been suffering from schizophrenia and had been unable to participate meaningfully in the proceedings. The Immigration Appeal Division (IAD) refused and he requested judicial review of that refusal. Justice Russell noted that:

> 40 It was open to the IAD to determine that the Applicant's schizophrenia was not in and of itself an adequate reason for the appointment of a designated representative. Indeed, there is no indication that the Applicant did not understand the proceedings. Furthermore, not all persons suffering from schizophrenia are

> incapable of understanding proceedings and participating in them. Each case must be considered on its own merits.
>
> [. . .]
>
> 53 In my view, the plain reading of section 167(2) read in context says that a Division need only designate a representative for someone who is not a minor if it forms an opinion that the person in question is unable to appreciate the nature of the proceedings. In my view, then, what is required to achieve procedural fairness will depend upon the full context of each case. In this case, the Panel knew that the Applicant had schizophrenia, but there was nothing to indicate that his schizophrenia prevented him from understanding the nature of the proceedings. In fact, the Applicant has a long history of appearing in legal proceedings and there is no evidence to suggest that his schizophrenia has prevented him from understanding what has taken place. There may well be situations where a Division is obliged to advise an applicant and undertake a formal inquiry into his understanding of the proceedings, but I do not think that such a procedure was required in the full context of this case.

[11] Justice Russell further commented on the situation of vulnerable claimants who were not children that "The jurisprudence in this area of the law is not fully developed" (para 66), although he noted two relevant decisions: *Sharma*, cited above in these reasons, which involved a psychologically vulnerable bereaved couple who had reported police detention and abuse, and *Abdousafi v Canada (MCI)*, 2001 FCT 1372, which involved a claimant who alleged that mental deficiency had prevented him from understanding the proceedings.

[12] I note in addition *Gilles*, cited above, decided the year after *Hillary*, in which the applicant was illiterate and claimed that he had been mentally troubled at the time of his hearing. In *Gilles*, the Court concluded that "It is apparent from the panel's reasons that it was sensitive to the applicant's limitations at the hearing and that it tried to take his difficulties into consideration [. . .]. The panel apparently did not notice anything abnormal about the applicant's mental state, and so the burden

was on counsel to refer to the Guideline, which he did not do. In my opinion, there was no error in the case at bar and the panel acted correctly" (para 17). The application was dismissed.

[13] In *Hillary*, Justice Russell certified a question as to the extent of a Board's responsibility when faced with a claimant suffering from a mental illness. The Federal Court of Appeal reviewed the issue in 2011. It observed that in this particular case:

> 15 In its reasons for dismissing the motion to reopen, the IAD noted that: Mr Hillary had been represented by counsel, who raised no concern over Mr Hillary's ability to instruct him; no request was made for a designated representative; Mr Hillary was familiar with IAD proceedings as a result of his successful appeal against the first deportation order; he testified and produced evidence designed to establish humanitarian and compassionate grounds for a stay of the second deportation order; nothing in Mr Hillary's behaviour or demeanour at the hearing indicated that he needed a designated representative; and two years had elapsed between the dismissal of the appeal by the IAD and the request to reopen.

[14] The Federal Court of Appeal also commented in its analysis that:

> 38 Nor is it said that, on the basis of the documentary evidence before it, and of Mr Hillary's behaviour at the hearing, including his responses to the questions put to him by counsel, it should have been obvious to the IAD that he did not understand the nature of the proceedings and therefore required the appointment of a designated representative.
>
> 39 One can say no more than this: Mr Hillary's schizophrenia may possibly have impaired his ability to appreciate the nature of the proceedings to such an extent that representation by counsel alone was insufficient to enable him to protect his interests and to participate meaningfully in the process. However, this is not enough to establish that the IAD's dismissal of Mr Hillary's appeal was vitiated by a breach of a principle of natural justice.
>
> 40 It is always within the discretion of the IAD to raise the issue itself and to inquire into the appellant's capacity. However, if the IAD makes no such inquiry, the Court should intervene only if

> satisfied on the basis of an examination of the entire context that the Board's inaction was unreasonable and fairness required the IAD to be proactive.
>
> [. . .]
>
> 49 I would add only this. If procedural fairness had required the IAD to inquire on its own initiative whether Mr Hillary appreciated the nature of the proceedings, I agree with Judge's view that the failure to inquire would have constituted a breach of a principle of natural justice, unless the appointment of a designated representative could, not would, have made no difference to the outcome of the appeal. See also *Stumf v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 148 at para 5; *Duale v Canada (Minister of Citizenship and Immigration)*, 2004 FC 150 at paras 20-21.

[15] The Federal Court of Appeal concluded in answer to the certified question that: "Whether the principles of natural justice require the IAD to initiate inquiries to enable it to form an opinion on whether an appellant who is suffering from a mental illness appreciates the nature of the proceedings depends on an examination of all the circumstances of the case. Since no such duty arose in the present case, it is not necessary to address the hypothetical question of the procedural steps that would have been necessary to discharge the duty" (para 50).

[16] In the present case, unlike in *Hillary* and *Gilles*, it is obvious from the transcript that the claimant was not rational throughout the course of the hearing. In my view, the applicant was denied procedural fairness when it became apparent that he was unable to give coherent testimony about the issues raised by his claim for refugee status and protection. The Presiding Member should have stopped the hearing at that point and considered alternative procedures to determine the claim. I am also satisfied that the Member did not demonstrate in her analysis that the applicant's mental state was taken into consideration in determining the merits of the claim and, in particular, of his explanations.

[17] Accordingly, this matter must be remitted for reconsideration by a different RPD panel. In doing so, the panel must consider again how best to accommodate the applicant's vulnerability, including the unreliable nature of the written materials in the record which he authored and the unreliable nature of statements which he made while not following prescribed courses of treatment. His testimony at the hearing on July 10, 2012 shall not be taken into consideration in the panel's determination.

[18] In view of the applicant's vulnerability, I will also order that the style of cause be amended to replace the applicant's name with initials.

[19] No questions for certification were proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter is remitted for reconsideration by a differently constituted panel of the Refugee Protection Division in accordance with the Reasons for Judgment provided;
2. The style of cause in this matter is amended to substitute the initials F.A.M. for the name of the applicant; and
3. No question is certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10524-12
STYLE OF CAUSE:	F.A.M. and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	May 15, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	May 29, 2013

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